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No. 777

In the
Supreme Court of the United States
OCTOBER TERM, 1967

HENRY C. BILLINGSLEY,
Petitioner,

v.

RICHARD L. MACKAY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS

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HENRY C. BILLINGSLEY,

Petitioner,

v.

RICHARD L. MACKAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS

Henry L. Billingsley, Petitioner, prays that a Writ of Certiorari be issued to review a Judgment of the United States Court of Appeals for the Fifth Circuit at New Orleans.

OPINIONS BELOW

The opinion and Judgment of the Trial Court and its opinion overruling Plaintiff's Motion for Rehearing, none of which has been officially reported, are set forth in Appendices "A", "B" and "C", respectively, of this Petition. (R. 55-56; 8-9; 82-86). The majority and dissenting opinions of the Court of Appeals, not yet officially reported, are set out in Appendix "D" of this Petition.

JURISDICTION

1. The Judgment of the Court of Appeals sought to be reviewed is dated and was entered July 5, 1967; and the Petition for Rehearing was denied on August 4, 1967.

2. Jurisdiction to review the Judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. §1254(1).

QUESTION PRESENTED

The Court of Appeals below permitted Respondent, the maker of a promissory note, to raise *for the first time on appeal* the contention that Petitioner, an assignee of his note, was not a holder in due course on the ground that the *delivery* of this note to the payee was conditional and Petitioner had notice of this when he bought the note. The Court of Appeals did this, and ruled against Petitioner solely on the basis of this previously unasserted defense, despite the fact that Respondent had expressly admitted delivery of the note by his answer (thus removing the issue of delivery from the case) and his testimony (R. 2, 6, 32-33) in the trial court, and even though "Nothing in the record before (the Court of Appeals), not the pleadings, nor the evidence, nor the finding of the court below, suggest that delivery was conditional * * *."[1]

The question here presented is whether this Court's power of supervision should be exercised to correct this obvious and grave departure by the Court of Appeals below from the

[1] Quoted from the dissenting opinion in the Court of Appeals below.

accepted and usual course of judicial proceedings, and to correct other erroneous decisions of the trial court (set out under Statement and Reasons for Granting the Writ, *infra)* which conflict with important applicable principles of state law, and were sanctioned by the Court of Appeals.

STATUTES AND RULES INVOLVED

This case involves *Texas Revised Civil Statutes,* Art. 5932, Secs. 3 and 16; Art. 5933, Secs. 24 and 28; Art. 5935, Secs. 52, 56 and 57; and Art. 5948, Sec. 191; the texts of which are set forth in Appendix "E" of this Petition. Principally involved are Art. 5948, Sec. 191, *Texas Revised Civil Statutes,* which declares:

> "Delivery" means transfer of possession, actual or constructive, from one person to another."

and Art. 5932, Sec. 16, which declares in part:

> "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of the party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

This action also involves *Federal Rules of Civil Procedure,* Rules 8(c) and 9(c), set out in Appendix "F" of this Petition. These rules require that affirmative defenses and a denial of performance of conditions precedent be expressly plead.

We believe that the "due process" clause of the Fifth Amendment to the United States Constitution is also involved.

STATEMENT OF THE CASE

Federal jurisdiction in this case is based on diversity of citizenship. Petitioner Billingsley, as Plaintiff, a resident of Bethesda, Maryland, sued Respondent Mackay, as Defendant, a resident of Dallas, Texas, on a promissory note which Petitioner alleged Respondent for a value consideration had executed and delivered to B. D. Fitzgerald, which note had been indorsed and assigned by the payee to Petitioner before maturity for a valuable consideration and which Petitioner took and held without notice of any defects therein and as a holder in due course for value. (R. 2-3)

On the back of the note was this notation: "This represents one-half (½) of investment in a one-half (½) interest in hand photocopy machine". (Plaintiff's Exhibit 1)

Respondent in his answer expressly admitted his execution and delivery of the note, "subject to the modifications and limitations * * * set forth as to the *maturity and payment*[2] of said note". (R. 6)

Respondent testified in answer to a question by the trial court that he told Petitioner, before Petitioner bought the note, that the note "was not due to be *paid*"[3] until Respondent received the assignment (R. 26-28); and he also testified that he trusted Fitzgerald with the note before he had the assignment, and was willing to give Fitzgerald the note with the notation written on it and wait until the end of the month for the assignment. (R. 32-33)

[2] Emphasis added.
[3] Emphasis added.

In its opinion the trial court held for Respondent on the ground that the discount at which Petitioner bought the note (Petitioner paid $12,000.00 for this $15,000.00 note) and the recital on the back of the note were "enough to put a man on notice" as to whether or not to purchase it. (R. 55-56)

In its judgment the trial court found that the notation on the back of the note was sufficient to put Plaintiff on notice that something was wrong with the instrument itself, or the title of Fitzgerald * * * (and) that Plaintiff received actual notice from Defendant that the validity of the note depended upon Defendant's receiving a one-half interest in the hand photocopy machine * * *" (R. 8-9)

In its order overruling Petitioner's motion for new trial the trial court after analyzing Respondent's defenses (and without any mention of conditional delivery) found that the notation on the back of the note coupled with the $3,000.00 discount were "enough to cause a prudent investor to hesitate and further investigate or reject the proposition outright"; that Plaintiff knew the machine had not been delivered at the time he purchased the note; and that the circumstances tended to corroborate the testimony of the Defendant "that he was not to *pay*[4] the note until he received the assignment". (R. 82-86)

[4] Emphasis added.

The "pleadings, the evidence and the decision * * * (in the trial court) were not at all concerned with conditional delivery."[5]

Petitioner argued in his main brief filed in the Court of Appeals, on the basis of the authorities set out in the footnote below, that the trial court's judgment was erroneous.[6] Obviously this argument of Petitioner was sucessful because

[5] Quoted from the dissenting opinion in the Court of Appeals below.

[6] (a) The recital on the back of the note is nothing more than a statement of the transaction which gave rise to the instrument, and has no legal effect. Art. 5932, *Texas Revised Civil Statutes*, Section 3, 2; *Commercial Guaranty State Bank v. Crews*, 196 S.W. 901; 9 *Tex. Jur.* 2d 24, §15, 115, §100

(b) The discount at which the note was bought had no legal effect. *Greenaux v. Wheeler*, 6 Tex. 525; *Campbell v. Rosenow*, 32 S.W. 2d 372 (writ refused); *Spurlock v. Zaring*, 27 S.W. 1099; *The Security State Bk. & Trust Co., v. Merchants' & Farmers' State Bk.*, 275 S.W. 721 (writ refused); *LaCoste Natl. Bk. v. Merchants' & Farmers' State Bk.*, 275 S.W. 725; 9 *Tex. Jur.* 2d 114, §99. At most, the discount is material only on the issue of bad faith in purchasing the note; Art. 5935, *Tex Rev. Civ. Stats.*, Sec. 56; and there was no pleading or evidence, or other contention of bad faith or fraud; 11 *Am. Jur.* 2d 473, §439;

(c) Neither the recital nor the discount, nor both, nor any other fact or circumstance can serve to put a purchaser of a note "on inquiry". The rule of constructive notice was held by the Law Merchant as not applicable to negotiable instruments in 1836. *Goodman v. Harvey*, 1836, 4 Ad. & El. 870. Texas rejected constructive notice in 1851. See *Goodman v. Simonds*, 1857, 20 How. (U.S.) 343, 15 L. Ed. 934, 941, and *Wilson v. Denton*, 82 Tex. 531, 18 S.W. 620; and the law of the Law Merchant, as followed in Texas, was adopted by the Negotiable Instruments Law. The defect or infirmity must be actually known by the purchaser or he must have knowledge of facts that make his action in taking the note amount to bad faith. Art. 5935, *Texas Rev. Civ. Stats.*, Secs. 52, 56; *The First Natl. Bk. of Aubrey v. Chapman*, 164 S.W. 900; *Goolsby v. Manning*, 270 S.W. 936. No issue of bad faith was raised in this case; and the burden was on Respondent to clearly plead such issue; *Butler v. Price*, 138 S.W. 2d 301, 304; 9 *Tex. Jur.* 2d 284, §263, 319, §292; 10 *C.J.S.* 1269, §629; Rule 8(c), *Federal Rules of Civil Procedure*;

(d) The date of payment specified in a note cannot be changed, nor conditions to its validity or payment be imposed, by Respondent's parole testimony. *Kuper v. Schmidt*, 161 Tex. 189, 338 S.W. 2d 948, 952; *Helmke v. Prosifka*, 17 S.W. 2d 463; *Lanius v.*

(Footnote continued on following page)

Respondent, despite his pleading and testimony in the trial court to the contrary and despite his failure expressly to plead or prove a conditional delivery, changed his position in this case for the ninth time[7] and relied solely on the contention raised for the first time in the Court of Appeals, that his note never became effective because it had not been delivered to the payee "for the purpose of transferring the property" therein, but had been delivered to the payee on the condition that it was not to become effective as a note until the payee delivered the assignment which was the consideration for the note. The Court of Appeals also agreed with Petitioner's argument, for its majority delivered an opinion affiirming the trial court's judgment on the *sole ground* that Petitioner had been informed that the delivery of the note was conditional.[8]

(Footnote continued from preceding page)
Shuler, 77 Tex. 24, 13 S.W. 614; *Houghton v. American Trust & Svgs. Bk.*, 247 S.W. 904; *Jones v. First State Bk. of Dumas*, 145 S.W. 2d 681, 684; *Shepherd v. Woodson Lbr. Co.*, 63 S.W. 2d 581, 583; *Adams Nat. Bk. v. Stone*, 284 S.W. 989, 990; 9 *Tex. Jur.* 2d 333, §301, 319, §292;

(e) Even if the alleged conversation between Respondent and Petitioner did occur it could not serve to give Petitioner notice of failure of the consideration for the note, or to prevent him from being a holder in due course, since by Respondent's own testimony such consideration was not due to be received from the payee until *after* this alleged conversation. Knowledge by the indorsee of an executory agreement of the payee not yet performed does not deprive the indorsee of the character of a holder in due course. *Continental Nat. Bank of Fort Worth v. Conner*, 147 Tex. 218, 214 S.W. 2d 928; *West v. First Baptist Church of Taft*, 123 Tex. 388, 71 S.W. 2d 1090, 1095; *Lozano v. Meyers*, 18 S.W. 2d 588; *Ed. Steves & Sons v. Lippman*, 254 S.W. 2d 184, 186; 9 *Tex. Jur.* 115, §100; 3 *ALR* 987.

[7] See pages 2-3 of the Reply Brief of Appellant filed in the Court of Appeals.

[8] The majority opinion contains certain erroneous statements. It declares that "Fitzgerald procured the note from Mackay through fraud." There is neither pleading nor evidence nor any intimation in the Record to support this statement. The opinion also states

(Footnote continued on following page)

REASONS FOR GRANTING THE WRIT

By admitting that his note was delivered Respondent removed this issue from the case, under both Federal and Texas law.[9] Also, since "a valid and intentional delivery by him (Respondent) is presumed until the contrary is proved,"[10] Respondent, by not expressly pleading a lack of delivery, impliedly admitted the delivery of his note and waived the defense of conditional delivery.[11]

(Footnote coninued from preceding page)

that Respondent asserted as one of his defenses that the notation on the back of the note put Petitioner under a duty to make inquiry, and that inquiry would have disclosed that the giving of the note was a conditional delivery. This alleged defense does not appear in Respondent's answer nor his brief filed in the Court of Appeals. The trial court erroneously injected this "duty of inquiry" issue into the case, ignoring completely the Negotiable Instruments Law and legal principles established for more than 100 years. Set Footnote 6, paragraphs (a) and (c), *supra*, "Conditional delivery" was not mentioned until Respondent, realizing that his defenses asserted in the trial court were unavailing, raised this defense in his brief filed in the Court of Appeals.

[9] *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 83 L. Ed. 195, 200, 59 Sup. Ct. 191; *United States v. Wimbish*, 154 Fed. 2d 773; *Historical Pub. Co. v. Jones Bros. Pub. Co.*, 231 Fed. 638; *Scott v. Commissioner of Internal Revenue*, 117 Fed. 2d 36; *Freedom National Bank v. Northern Illinois Corp.*, 202 Fed. 2d 601; *Lafield v. Maryland Casualty Co.*, 119 Tex. 466, 33 S.W. 2d 187, 189; *Caulk v. Anderson*, 120 Tex. 253, 37 S.W. 2d 1008; 45 *Tex. Jur.* 2d 517, § 82; *McCormick on Evidence* (Hornbook Series, 1954) 508, § 242.

[10] Art. 5932, *Texas Rev. Civ. Stats.*, § 16.

[11] *Federal Rules of Civ Procedure*, Rule 8(c); Rule 9(c); *Temperato v. Rainbolt*, 22 F.R.D. 57; *Systems Incorporated v. Bridge Electronics Co.*, 335 F. 2d 465, 466; *Brown v. Warner*, 173 F. 2d 162; *Fontes v. Porter*, 156 F. 2d 956; *Butler v. Price*, 138 S.W. 2d 301, 304 (no writ hist.); *Puckett v. Big Lake State Bank*, 73 S.W. 2d 893, 897 (writ ref.); 9 *Tex. Jur.* 2d 284, § 263; 9 *Tex. Jur.* 2d 319, § 292; 45 *Tex. Jur.* 2d 524, § 85; *Anderson v. Ladd*, 131 Tex. 479, 115 S.W. 2d 608, 610:

> "* * * the statute undoubtedly regards the delivery as having been made for the purpose of giving effect to the instrument according to its terms, unless it be shown that by agreement of the parties, including the payee, the delivery was made for some other purpose.";

9 Tex. Jur. 2d 302, §279:

(Footnote continued on following page)

The Court of Appeals in permitting Respondent to assert in that court for the first time the defense of conditional delivery and notice thereof, and in deciding the case solely on that issue, despite such admissions and waiver and the removal of that issue from the case, not only made a shocking and unprecedented departure from a salutary and necessary procedural rule[12] and the accepted usal course of judicial proceedings—*it also effectively deprived Petitioner of a hearing on the issue of delivery of the note,* thus denying him due process of law and violating the Fifth Amendment to the United States Constitution.

It is obvious from a reading of the trial court's opinion, judgment and order overruling the Motion for New Trial, and from the inadmissible evidence pertaining to payment of the note which the trial court itself elicited from Re-

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(Footnote continued from preceding page)

"Thus delivery to the payee raises a presumption that the note was intended to be effective in the absence of a showing that the delivery was for some other purpose."

An agreement to "postpone the time of payment of a delivered promissory note is far different from a conditional delivery, or an escrow agreement." *Adams Nat. Bank v. Stone,* 284 S.W. 989, 990. A finding of conditional delivery cannot be implied, *Cook v. Barrier,* 73 S.W. 2d 463; 10 C. J. S. 1269, §629.

[12] *Hormel v. Helvering,* 312 U. S. 552, 556, 61 S. Ct. 719, 721, L. Ed. 1037, 1041:

"Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

Wagner v Retail Credit Company, 338 F. 2d 598:

"It is axiomatic that a litigant cannot present arguments in this court which it had not presented to the court below."

spondent (R. 26-28), that the trial court decided this case in utter disregard of the law, making a complete shambles of the rules of law applicable to negotiable instruments that are written into the Negotiable Instruments Law and have been firmly established and have prevailed without dissent for more than 100 years. A comparison of the two opinions of the Court of Appeals and the conflict between them as to factual matters—as to what is and what is not in the record—and as to what was and was not done in the trial court—makes it obvious also that either the Justices who wrote the majority opinion or the dissenting Justice failed to give the record in this case the necessary attention required in order to render a fair and proper decision consistent with prevailing law.

It is submitted that in this case the Court of Appeals, perhaps because of a docket too crowded with cases deemed by it more important or interesting than this one, strained too far to affirm the trial court's judgment and has rejected its duty to supervise that court. Therefore, in order to prevent (1) a shocking and unprecedented departure from the rules of procedure, (2) a complete erosion of legal principles applicable to negotiable instruments in the State of Texas, and (3) a miscarriage of justice and a denial to Petitioner of a right to a hearing on the sole issue on which the Court of Appeals based its decision, this Court should exercise its power of supervision and grant a Writ of Certiorari herein, so that both the District and

Appeals Courts will be reminded, as all of us must be reminded from time to time, that there are limits to what a Court of Appeals may do in order to sustain a trial court's judgment, and that litigants in small commercial cases, as well as those being tried on criminal charges, must also be given their day in court.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

COUNTY OF DALLAS
STATE OF TEXAS } ss.

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared SOL GOODELL, who being by me duly sworn upon oath stated:

I, SOL GOODELL, am not a member of the bar of Supreme Court of the United States; but I am a duly licensed and practicing attorney and a member of the State Bar of Texas and have been one of the attorneys of record for Petitioner herein in all proceedings had in the court of appeals below.

I further state upon oath that on the 27th day of October, 1967, I served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mailing copies of such Petition, properly addressed, with postage prepaid, to Mr. Philip I. Palmer, 2130 First National Bank Building, Dallas, Texas 75206 and to the law firm of Palmer, Green, Palmer & Burke, at the same address.

SOL GOODELL

Sol Goodell

SWORN TO AND SUBSCRIBED before me by the said SOL GOODELL this the 27th day of October, 1967.

[Notary Seal]

RUBY FOSTER

Notary Public in and for Dallas County, Texas

APPENDIX "A"

OPINION OF THE TRIAL COURT

Gentlemen, sometimes intelligent men do things that it is hard to explain. Each of these gentlemen have manifestly fallen victims to a con-man, and we wonder why they did it.

Mr. Billingsley is the holder of a note that he bought, allegedly, and supposedly signed by Mr. MacKay. Mr. Billingsley bought the note at a very large discount, and on the back of that note was written certain matters which would put any investor on notice that there was something pending and affected the value of that note, or the thing for which the note was given. When we consider the discount on the note, and when we consider the recitation on the bank of the note, which was patent and open and there to be seen for all purposes, the recitation on the back of the note was enough to put a man on notice. The man that defrauded Mr. Billingsley is said to be in the penitentiary, so stated in the pleading, and how each of these men could not discover that he was of that type is a little difficult to understand. If they had been sitting in this courtroom on a few cases they would be better educated about con-men.

We think that under the circumstances, with the recitation on the back of the note that was such as to put Mr. Billingsley on inquiry as to whether or not to purchase it.

We will render judgment in favor of the defendant.

APPENDIX "B"

JUDGMENT

This action came on for trial before the Court, Honorable T. Whitfield Davidson, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, the Court finds that the endorsement on the back of the $15,000.00 note of Defendant was sufficient to put Plaintiff on notice that something was wrong with the instrument itself, or the title of Fitzgerald, who assigned it to him; that Plaintiff received actual notice from Defendant that the validity of the note depended upon Defendant's receiving a one-half interest in the hand photocopy machine; that after receiving such notice Plaintiff accepted assignment of the note from Fitzgerald and paid him a total of $12,000.00 therefor; that Defendant has never been tendered, nor has he received the assignment for which the note was issued.

IT IS ORDERED AND ADJUDGED, that the Plaintiff take nothing, that the action be dismissed on its merits and that the Defendant, RICHARD L. MACKAY, recover of the Plaintiff, HENRY E. BILLINGSLEY, his costs of action.

Plaintiff excepts to this Judgment and finding.

Dated at Dallas, Texas, This 21st Day of June, 1965.

/s/ T. WHITFIELD DAVIDSON

District Judge

APPENDIX "C"

OPINION OVERRULING PLAINTIFF'S MOTION FOR REHEARING

This controversy involves the status and validity of a promissory note passed between the parties.

The complaint alleges:

1. That the defendant Mackay did on May 9, 1964, execute and deliver his promissory note in the amount of $15,000.00 to one B. D. Fitzgerald;

2. That on May 22 following Fitzgerald assigned the note to the plaintiff Henry E. Billingsley who claims to be an innocent holder;

3. The whereabouts of Fitzgerald are now unknown. He is not made a party to the suit.

4. The note not having been paid, the plaintiff Billingsley filed suit in this court on February 8, 1965.

DEFENDANT'S ANSWER

1. The defendant denies the pertinent part of the complaint.

2. He says the note was given by Mackay to Fitzgerald for an interest in a copying machine, that the assignment of the interest was to be delivered in the future.

3. The back of the note in question carried the following recitation:

"This represents one-half (½) of investment in a one-half (½) interest in hand photocopy machine."

4. Defendant told the plantiff before the plaintiff purchased the note that the assignment promised had not been delivered.

5. The machine was never delivered.

6. Said Fitzgerald is now in the Los Angeles jail on a charge of swindling.

At a trial on June 21, 1965 judgment was rendered in favor of the defendant. On June 30, 1965 the plaintiff filed a motion for new trial. Each of the parties is represented by able counsel and the case has been well developed.

FINDINGS AND CONCLUSIONS BY THE COURT

1. The evidence substantially conforms to the pleading of the parties.

2. The plaintiff lives in one state and the defendant in another.

3. There was but a very limited knowledge or acquaintance existing between the parties at the time of the alleged transaction.

4. A $3,000.00 discount in the sale of the note seems large.

5. The note carried upon its back a restrictive entry which when coupled with the limited knowledge and acquaintance between the parties makes the very substantial $3,000.00 discount enough to cause a prudent investor to hesitate and further investigate or reject the proposition outright.

6. A transaction is not consummated or complete until there is a delivery of the object purchased. Plaintiff knew that the machine had not been delivered at the time he purchased the note.

7. The plaintiff knew the note was based upon the promise of a stranger to sell a man an undivided interest in an undivided interest of some kind of copying machine.

8. A prudent investor must of course have known that a part interest in one small individual machine could hardly be worth $15,000.00. Thus he would have to surmise that it was a part interest in a patent, the contents of which he could have no knowledge. And what could have been the wording of such an assignment? If he is left to guess or surmise further, then it must be a corporate entity in which he is to get an interest, assuming that the patent ownership might have been incorporated. Then how many shares would he be entitled to? And who would be the board of directors in the corporation and the managers therof? What thoughtful businessman would pay $15,000.00 for stock in an unknown company? And again, would not such man want to know something of the personnel of the management of such company?

The circumstances tend to corroborate the testimony of the defendant Mackay that he was not to pay the note until he received the assignment, and such fact reasonably appears from the attitude of the parties.

In this hearing on the merits and in the motion for new trial each party was represented by able counsel.

All points lead to a conclusion that the plaintiff and the defendant were each victims of a con man dealing in empty promises to be, not yet on paper and to be yet delivered to the maker of the note.

We think this case must turn upon the conduct of the parties involved as is set forth in the two following decisions:

> "Where one of two innocent persons must suffer a loss, it should fall upon him who, by reasonable diligence or care, could have protected himself." *National Sav Bank v. Creswell*, 100 U.S. 630.
>
> "If one of two innocent persons must suffer by a deceit, it is more consonant with reason that he who puts trust and confidence in the deceiver should be the loser." *Carpenter v. Longan*, 16 Wall. 271.

It is the Court's finding and conclusion that the plaintiff in purchasing the note exercised less diligence than the defendant and that he who puts trust and confidence in a deceiver should be the loser. And finding that the plaintiff was less prudent and less diligent in the transaction than the defendant, the motion for new trial will be overruled and the judgment in favor of the defendant will stand.

s/ T. WHITFIELD DAVIDSON

District Judge

APPENDIX "D"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22996

HENRY E. BILLINGSLEY,

Appellant,

versus

RICHARD L. MACKAY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(July 5, 1967).

Before JONES and COLEMAN, Circuit Judges, and HEEBE, District Judge.

PER CURIAM: The appellant, Henry E. Billingsley, sued the appellee, Richard L. Mackay, upon a promissory note for $15,000 given by Mackay to B. D. Fitzgerald from whom Billingsley purchased the note for $12,000. Federal jurisdiction is based upon diversity of citizenship. On a trial without a jury the district court rendered judgment for

Mackay. The judgment is affirmed. Fitzgerald procured the note from Mackay through fraud. At the time Mackay gave the note to Fitzgerald he placed upon the back of it a notation which he asserted, as one of his defenses, put Billingsley under a duty to make inquiry and inquiry would have disclosed that the giving of the note was a conditional delivery. Mackay also contended, and the district court found that Billingsley had actual notice from Mackay that "the validity of the note depended upon defendant's receiving" an assignment. This finding, in the light of the pleadings and the testimony, we regard as a finding that Billingsley had been informed that the delivery of the note was conditional. The evidence sustains the finding. Since the court found that there was actual notice, no necessity exists for considering the effect of the notation on the back of the note. Billingsley moved for a new trial for the purpose of bringing in another witness. The motion was denied. No error was committed by the denial of the motion.

The judgment of the district court is AFFIRMED.

HEEBE, District Judge, dissenting:

I must respectfully dissent.

The maker of the note, defendant-appellee, never received the agreed-upon consideration for the note, and thus raised the defense of failure of consideration against plaintiff-appellant's claim as holder of the note. This defense is valid only if plaintiff is not a holder in due course under §§ 52 and 56-58 of the Negotiable Instruments Law, contained in Art. 5935, Tex. Rev. Civ. Stat. There was disputed testimony in

the court below to the effect, and the court found, that when the plaintiff was considering purchasing the note, he was informed by the defendant-maker of certain limitations on the validity of the note arising from the accompanying transaction. It is my understanding of the law that even if the communications between plaintiff and defendant did take place, those communications were insufficient to prevent plaintiff from becoming a holder in due course.

First, it is clear that the note was negotiable—the notation on the back of the note was merely a statement of the transaction giving rise to the instrument, and under § 3 of the N.I.L. and Art. 5932, that statement does not make the promise to pay conditional. The N.I.L. makes incorrect the conclusion of the trial court that the notation "was sufficient to put plaintiff on notice that something was wrong with the instrument itself." Second, the plaintiff was entitled to rely on the unconditional nature of the promise to pay and to disregard any oral statements there may have been to the effect that the promise to pay was conditional—the terms and provisions of the written instrument cannot be varied by parole evidence. Third, at the time plaintiff purchased the note, he had no notice that the consideration had failed: since defendant's own testimony was that the consideration for the note was not yet due from the payee of the note at the time of the alleged communication between plaintiff and defendant, then, at most, plaintiff had knowledge that the executory agreement of the payee had not been performed at the time he purchased the note. The law

of Texas as to the effect of such knowledge is well stated in 9 Tex. Jur. 2d., Bills and Notes, § 100, p. 115:

> "Knowledge that a note was given in consideration of an executory agreement of the payee that has not yet been performed will not deprive the indorsee of the character of a holder in due course, unless he also has notice of the breach of that agreement,"

repeating, virtually unchanged, the statement in 6 Tex. Jur., Bills and Notes, § 95, p. 712. It was held in *Ed. Steves & Sons v. Lippmann*, 254 S.W. 2d. 184, 186 (Tex. Civ. App. 1952), that knowledge that the contract was executory did not preclude the holder from being a holder in due course where nothing in the note indicated its validity depended on the completion of, or was subject to, the contract, citing *Continental National Bank of Fort Worth v. Conner*, 147 Tex. 218, 214 S.W. 2d 928 (1948) which explained that under § 56 of the N.I.L. and Art. 5935 the test is not constructive notice, but "dishonest disregard." There may be some limitation on this rule where prior to the date set for completion of the executory agreement, the proposed purchaser of the note has knowledge that there *will be* a breach, see *Commonwealth Bank & Trust Co. of San Antonio v. Limburger*, 199 S.W. 816 (Tex. Civ. App. 1918), but that situation was not found to be present here.

I am thus forced to state my view that the court below applied erroneous legal standards in concluding that plaintiff was not a holder in due course: accordingly, the defense of failure of consideration cannot be raised against him. It appears that defendant-appellee realized this, because in

this Court he raised for the first time the contention that the plaintiff knew when he purchased the note not only that *payment*, but also that *delivery* of the note by defendant to Fitzgerald was conditioned on the delivery of the agreed-upon consideration; thus, since evidence of a conditional delivery is not parole evidence and is admissible, plaintiff's knowledge of the conditional delivery prevented him from becoming a holder in due course and the defense of failure of consideration was properly raised against him, as was the defense of conditional delivery. This contention would be legally sound except that the pleadings, the evidence and the decision below were not at all concerned with conditional delivery. The majority opinion here regards the finding of the court below as one that plaintiff had been informed that the delivery of the note was conditional, but I can find no basis for the action of the majority in the record. Conditional delivery is described in § 16 of the N.I.L. and Art. 5932 as "not for the purpose of transferring the property in the instrument." Nothing in the record before us, not the pleadings, nor the evidence, nor the finding of the court below, suggest that delivery was conditional, and so I must respectfully state my view that there is no support for this Court's finding of conditional delivery.

Although the result reached in the court below and in this Court may be equitable, the N.I.L. prevents us from applying our own standards as to which party was less prudent in his dealings with a swindler—the N.I.L. resolves the issue against a party who places a negotiable instrument in the stream of commerce, not against a party who purchases

the instrument in reliance upon an unconditional promise contained therein without knowledge of any defenses. Since no valid defenses of which the plaintiff could have had knowledge were alleged or proved or found by the court below, the knowledge plaintiff was found to have should not preclude him from being a holder in due course. Accordingly, I believe that application of proper legal principles to the findings of fact of the court below would demand a reversal of the judgment.

EXHIBIT "E"

TEXAS REVISED CIVIL STATUTES

Art. 5932. Form and interpretation

Unconditional order or promise to pay

Sec. 3. An unqualified order or promise to pay is unconditional within the meaning of this Act, though coupled with:

2. A statement of the transaction which gives rise to the instrument; but an order or promise to pay out of a particular fund is not unconditional.

Delivery; necessity; when effectual; presumption

Sec. 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a

party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Art. 5933. Consideration

Presumption of consideration

Sec. 24. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Holder for value

Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Art. 5935. Rights of the holder

Holder in due course defined

Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

3. That he took it in good faith and for value;

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Notice of infirmity or defect

Sec. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Holder in due course; rights

Sec. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Art. 5948. General provisions

Definitions

Sec. 191. In this Act, unless the context otherwise requires:

"Delivery" means transfer of possession, actual or constructive, from one person to another.

EXHIBIT "F"

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption or risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

PLEADING SPECIAL MATTERS

Rule 9.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

SUPREME COURT, U. S.

FILED
NOV 14 1967
JOHN F. DAVIS, CLERK

No. 777

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HENRY C. BILLINGSLEY,
Petitioner,

v.

RICHARD L. MACKAY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Respondent cannot concur with the question presented as stated by Petitioner. In Repondent's opinion, the sole question presented for review is "whether the defense of conditional delivery was raised by the pleading, supported by the evidence and found to be true by the trier of facts?"

If the answer is in the negative, and if the successful defense were actually raised for the first time on appeal, then the protests of petitioner take on some substance.

On the other hand, if the defense of conditional delivery was actually pleaded, proved and found at the trial level, then all of Petitioner's elaborate objections are of no avail.

FIRST COUNTERPOINT

Respondent's defense of Conditional Delivery was pleaded, proved, and found to be true by the trial court.

Petitioner does not deny that conditional delivery is a valid defense against one with actual knowledge of the infirmity, but confidentally asserts that the defense was not pleaded. (Petition 2, 5, 6, 7, 8, 9). This is obviously the contention which goes to the heart of his Application. Just as obviously, the issue can only be settled by examining the answer itself. There, under the Third Defense, are found the following allegations:

> a. * * * "on condition that no part thereof should be paid by the defendant until such delivery." (R. 6)
>
> b. * * * "the assignment of the interest by the Defendant was a condition to the validity of such note." (R. 7)
>
> c. * * * "the note would be good only when he received the assignment." (R. 7)

Even if conditional delivery be an affirmative defense, rather than a denial of a portion of Petitioner's prima facie case so that it must be affirmatively pleaded, still the basic

premise of pleading is only to afford fair notice to the parties of the claim and the defense.

Conley v. Gibson, 355 U.S. 41 (1957).

Although an affirmative defense must be pleaded, only fair notice is required, without extensive factual allegations.

American Motorists Insurance Co. v. Napoli, 166 F. 2d 24 (5th Cir. 1948)

2A Moore, Federal Practice, 8.27(3)

Factual detail, if needed, is obtained through discovery rules.

As the Respondent pleaded at three different points and in three different ways that the note was only conditionally delivered, and was not to be valid until he received the assignment of the patent forming the consideration, it is difficult to see just what more could have been done to give Petitioner fair notice

There must, of course, be evidence offered to support the defense pleaded, and it is found in the clear testimony of Respondent. (R. 27). Petitioner appears to concede that this is supporting testimony, but terms it "inadmissible". (Petition, p. 9). The apparent basis for the obpection to the testimony is that it is barred under the parol evidence rule as an attempt to vary the terms of a written instrument. This objection overlooks the well founded rule that parol evidence is admissible when it relates to the very existence of the contract. Conditional delivery is such a defense, and parol evidence is admissible to show that the delivery was upon a condition precedent to its validity.

Cimarron Insurance Company v. Pomeroy, 234 F. 2d 262 (10th Cir. 1956)

Dayvault v. Baruch Oil Corp., 231 F. 2d 413 (10th Cir. 1956)

Ramey v. Koons, 230 F. 2d 802 (5th Cir. 1956)

Equally fatal to Petitioner's Evidence Point is that fact that it has not been preserved for presentation to this Court.

Supreme Court Rules, Rule 23 (1) (c)

Pleading and evidence alone still are not enough to prevail, unless the tier of facts is persuaded of the truth of the asserted defense. The judgment of the trial court (R. 9) expressly holds "* * * Plaintiff received actual notice from Defendant that the validity of the note depended upon Defendant's receiving a one-half interest in the hand photocopy machine."

To combat this record, and also to avoid the fact that even the dissent below concedes the result reached was the equitable one, Petitioner argues that delivery was conceded and cannot, therefore, be denied. Petitioner persists here, as below, in confusing physical delivery with the legal defense of conditional delivery. Actually, the latter presupposes the former, for unless there were a physical delivery, a delivery upon a condition would be an impossibility. Respondent has never denied that the note is physically in Petitioner's possession, but does contend that the delivery was conditional. None of Petitioner's authorities regarding questions of physical delivery are helpful.

The attack by Petitioner upon the various collateral findings and observations of the trial court are also not determinative of the issue. Even assuming, for point of argument, that every other finding, conclusion and observation of the District Court was erroneous, still the judgment would stand as the issue of conditional delivery alone is fatal to Petitioners' case.

SECOND COUNTERPOINT

A due process question is not before this court.

Some argument is made that the opinion of the Court of Appeals is so erroneous that it, per se, is a denial of the constitutional rights of the Petitioner. (Petition, p. 3, 9, 10). This novel theory is raised for the first time to this Court, but is not raised by a question presented. This tardy attempt to insert a constitutional question in violation of Rule 23 (1) (c) *Supreme Court Rules* should not be considered by this Court both for lack of merit as well as procedural deficiencies.

Ellis v. Dixon, 349 U.S. 458 (1955);

Flournoy v. Wiener, 321 U.S. 253 (1944);

National Licorice Co. v. N.L.R.B., 309 U.S. 350 (1940);

United States Constitution, Fifth Amendment.

THIRD COUNTERPOINT

No justification for issuance of a writ exists.

Notwithstanding the strong language of the Petition, this case is nothing more than a matter of private litigation turning upon the construction of particular pleading and the

evaluation of evidence. No special consideration exists, and Petitioner has shown none, under *Rule 19, Supreme Court Rules*, for this Court to issue its Writ. Petitioner has had his day in Court, and has had his appeal. This lawsuit should be concluded.

PRAYER

WHEREFORE, Respondent prays that Petitioner's application for Writ of Certiorari be denied.

Respectfully submitted,

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